

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>Franklin Square Holdings, L.P.</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	<b>Civil Action No.:</b>
<b>v.</b>	:	
	:	
<b>GROWMARK, Inc.</b>	:	
	:	
<b>Defendant.</b>	:	

**COMPLAINT FOR DECLARATORY JUDGMENT  
OF TRADEMARK NONINFRINGEMENT**

Plaintiff, Franklin Square Holdings, L.P. (“Franklin Square”), by and through counsel, brings this Complaint for Declaratory Judgment against Defendant, GROWMARK, Inc. (“Growmark”) and alleges as follows:

**PRELIMINARY STATEMENT**

1. This is an action for a declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, that (1) Franklin Square’s use of its FS INVESTMENTS® Marks does not infringe upon or interfere with the asserted rights of Growmark and (2) Franklin Square’s acts have not violated and do not violate federal or state laws relating to trademark infringement or unfair competition, including without limitation, Sections 32 and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a).

**PARTIES**

2. Plaintiff Franklin Square Holdings, L.P. is a Pennsylvania limited partnership organized under the laws of the Commonwealth of Pennsylvania, and has a principle place of business at 201 Rouse Boulevard, Philadelphia, Pennsylvania 19112.

3. Defendant GROWMARK, Inc. is a corporation organized under the laws of the State of Delaware, with a principal place of business at 1701 Towanda Avenue, Bloomington, Illinois 61701.

### **JURISDICTION AND VENUE**

4. There is a justiciable controversy between Franklin Square and Growmark, namely Growmark is alleging and has alleged that Franklin Square is committing trademark infringement and unfair competition.

5. Subject matter jurisdiction arises under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the laws of the United States concerning trademarks and unfair competition, 15 U.S.C. §§ 1114, 1125(a) and 28 U.S.C. § 1338(b)), and under the supplemental jurisdiction provisions of 28 U.S.C. §§ 1331, 1338(b) and 1367(a).

6. This Court has personal jurisdiction over Growmark because (i) Growmark has purposefully availed itself of this forum by maintaining an active, online website that is accessible to and actively advertises to residents of this judicial district; and (ii) a substantial part of the events giving rise to this action have occurred and continue to occur in this judicial district. Growmark, therefore, has sufficient minimum contacts with this jurisdiction, and as such, it would be reasonable to require Growmark to defend a lawsuit brought in this Commonwealth.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400 because (i) a substantial part of the events giving rise to this declaratory judgment occurred in this judicial district; (ii) Franklin Square has a principal place of business in this district; and (iii) Growmark does business in this district.

## **FACTUAL BACKGROUND**

### **Franklin Square and its Intellectual Property**

8. Franklin Square is an independent asset management firm that provides access to alternative sources of income and growth historically available only to large institutions and the wealthiest individuals by managing a growing suite of funds and other investment product offerings, including, but not limited to closed-end and open-end funds, business development companies and a real estate investment trust, all designed to help individuals and institutions achieve a variety of financial goals. Franklin Square's financial and investment products and services described in this paragraph are collectively referred to herein as the "Franklin Square Asset Management Services".

9. Since 2009, Franklin Square has adopted and used numerous marks comprising "FS INVESTMENTS" and/or owns numerous U.S. trademark registrations comprising "FS INVESTMENTS" for use in connection with the Franklin Square Asset Management Services (collectively the FS INVESTMENTS® Marks).

10. Franklin Square has used the FS INVESTMENTS® Marks in connection with the Franklin Square Asset Management Services and the federal registrations of Franklin Square's FS INVESTMENTS® Marks evidences Franklin Square's exclusive right to use the FS INVESTMENTS® Marks in connection with these registered services, including but not limited to, providing financing, asset management, and investment services in International Class 36.

11. Franklin Square owns U.S. Trademark Registration No. 4,723,056 for FS INVESTMENTS for "[i]nvestment of funds for others; management of investment of funds for others; investment management services; Business Development Company funding services to

small and mid-sized businesses; Business Development Company services, namely, providing financing to small and mid-sized businesses; Business Development Company fund management; Business Development Company financing; mutual fund brokerage, distribution, investment; investment administration, distribution, and management of mutual funds; financial portfolio and investment management; investment advisory services; investment consultation; financial asset management; stock brokerage services; fund investment consultation; funds investment; asset allocation services” in International Class 36 and first used this mark in commerce on May 30, 2009.

12. Franklin Square owns U.S. Trademark Registration No. 4,989,475 for FS



INVESTMENTS and Design for “[i]nvestment of funds for others; management of investment of funds for others; investment management services; Business Development Company funding services to small and mid-sized businesses; Business Development Company services, namely, providing financing to small and mid-sized businesses; Business Development Company fund management; Business Development Company financing; mutual fund brokerage, distribution, investment; investment administration, distribution, and management of mutual funds; financial portfolio and investment management; investment advisory services; investment consultation; financial asset management; stock brokerage services; fund investment consultation; funds investment; asset allocation services” in International Class 36 and first used this mark in commerce on January 26, 2016.

13. Franklin Square owns U.S. Trademark Registration No. 5,102,059 for FS

INVESTMENT SOLUTIONS for “[i]nvestment of funds for others; management of investment of funds for others; investment management services; Business Development Company funding

services to small and mid-sized businesses; Business Development Company services, namely, providing financing to small and mid-sized businesses; Business Development Company fund management; Business Development Company financing; mutual fund brokerage, distribution, investment; investment administration, distribution, and management of mutual funds; financial portfolio and investment management; investment advisory services; investment consultation; financial asset management; stock brokerage services; fund investment consultation; funds investment; asset allocation services; financial services, namely, broker/dealer services on securities exchanges and over-the-counter markets” in International Class 36 and first used this mark in commerce on August 16, 2016.

14. Franklin Square’s FS INVESTMENTS® Marks are strong and inherently distinctive. Since 2009, Franklin Square has expanded its use of and registrations for its FS INVESTMENTS® Marks and the FS INVESTMENTS® Marks have developed invaluable goodwill and reputation within the asset management industry as a source designator of Franklin Square’s Asset Management Services.

15. Franklin Square’s FS INVESTMENTS® Marks have become well-known throughout the asset management industry. Through its widespread, continuous, and exclusive use of the FS INVESTMENTS® Marks to identify the Franklin Square Asset Management Services, Franklin Square owns valid and subsisting federal statutory and common law rights to the FS INVESTMENTS® Marks.

16. Franklin Square has expended substantial time, money, and resources marketing, advertising, and promoting its asset management services under the FS INVESTMENTS® Marks.

17. The market success of the Franklin Square Asset Management Services offered under the FS INVESTMENTS® Marks has been extraordinary, and the relevant public has come to rely upon and recognize the Franklin Square Asset Management Services by Franklin Square's FS INVESTMENTS® Marks.

**Growmark and its Intellectual Property**

18. Growmark is a regional cooperative providing agriculture-related products and services, as well as grain marketing in the United States and Ontario, Canada. Crop inputs and energy-related services are also marketed to farmers in the northeastern United States and by Growmark subsidiaries. Growmark uses the Growmark FS Marks for goods and services related to agriculture, including fertilizers, fuel, propane, private label crop protection products, proprietary brands of corn and soybean seeds, grain marketing, commercial construction, logistics, and electronic payment services. Growmark's agriculture-related goods/services described in this paragraph are collectively referred to herein as the "Growmark Goods and Services."

19. Growmark owns U.S. Trademark Registration No. 5,121,266 for FS and Design



for "[p]aints, varnishes, lacquers, and preservatives against rust and against deterioration of wood in the nature of a coating in Class 2; rinsing preparations, namely, fluids for cleaning agricultural chemical storage tanks in Class 3; Gasoline; tractor fuel; diesel fuel; liquefied petroleum gas; industrial grease; industrial lubricants; furnace and stove fuel oils; lubricating oils and greases for vehicles; propane; biodiesel fuels; ethanol blended fuels; soy-based fuels; alcohol blended fuels; metalworking fluids, namely, lubricants; hydraulic oils; engine oils; compressor oils; concrete form oil; vacuum pump oil; white oil, namely, mineral oils

for use in the manufacture of other products; special purpose industrial lubricants; gear lubricants in Class 4; Seeds for agricultural purposes, namely, corn seed, field seed, grain seeds; soybean seed; agricultural seed in Class 31; Wholesale and retail distributorships featuring agricultural products, materials and supplies to farmers; retail convenience store services; business consulting services in the agricultural field; agricultural cooperative services, namely, cooperative advertising and marketing services and distributorship services in the field of agricultural products, materials and supplies; Fuel management consulting services, namely, providing recommendations for fuel selection and usage in Class 35; Financial services, namely, banking services in Class 36; Grain storage; bulk transportation, storage and delivery of goods in Class 39; Agricultural research; agricultural testing and analysis for determining soil nutrients and composition, soil sampling, crop mapping and crop observation in Class 42; and Agricultural consulting services; turf consulting services, namely, providing recommendations for plant and soil nutrition supplements, providing advice on the selection and application of agricultural chemicals and seed, and providing advice about application of agricultural chemicals and the use and application of crop protection products, agricultural chemicals and agricultural seed in Class 44.”

20. Growmark owns U.S. Trademark Registration No. 5,360,625 for FS for “[f]ertilizers; adjuvants and surfactants used in agronomic applications, namely, for use in connection with agricultural chemicals; brake fluid; transmission fluids; power steering fluids; diesel exhaust fluids; quenching fluids for use in metalworking; propylene glycol; antifreeze; coolants; power fluids, power steering fluid for vehicles; metalworking fluids, namely, coolants; Chemical additive fluids for fuel treatment to improve vehicle performance and fuel efficiency in Class 1; Paints, varnishes, lacquers, and preservatives against rust and against deterioration of

wood in the nature of a coating; stoddard solvent, namely, mineral spirits for use as a paint thinner in Class 2; Cleaning, polishing, scouring, abrasive preparations; rinsing preparations, namely, fluids for cleaning agricultural chemical storage tanks in Class 3; Seeds for agricultural purposes, namely, corn seed, field seed, grain seeds; soybean seed; agricultural seed in Class 31; Wholesale and retail distributorships featuring agricultural products, materials and supplies to farmers; retail convenience store services; business consulting services in the agricultural field; agricultural cooperative services, namely, cooperative advertising and marketing services and distributorship services in the field of agricultural products, materials and supplies; Fuel management consulting services, namely, providing recommendations for fuel selection and usage in Class 35; Financial services, namely, banking services in Class 36; Grain storage; bulk transportation, storage and delivery of goods in Class 39; Agricultural research; agricultural testing and analysis for determining soil nutrients and composition, soil sampling, crop mapping and crop observation in Class 42; and Agricultural consulting services; turf consulting services, namely, providing recommendations for plant and soil nutrition supplements, providing advice on the selection and application of agricultural chemicals and seed, and providing advice about application of agricultural chemicals and the use and application of crop protection products, agricultural chemicals and agricultural seed in Class 44.”

21. Growmark owns U.S. Trademark Registration No. 2,371,319 for FS AGRI-FINANCE for “[f]inancial services, namely, providing loans to farmers” in Class 36.

22. Growmark owns pending U.S. Trademark Application No. 88/241,512 for FS and




pending U.S. Trademark Application No. 88/688,731 for “Downloadable computer e-commerce software to allow users to perform electronic business transactions via



mobile devices and local and global computer networks; downloadable computer software applications to assist agricultural professionals with the inspection, research, data collection and analysis, spectral sampling, and information on crop health and precision agriculture methods and technology; downloadable computer software applications for agricultural, automotive, energy, and industrial uses, namely, for use in data collection, aggregation, analysis, georeferencing, management, reporting, warehousing, employment recruiting, financial analysis, event logistics, order entry, payments, product selection and use, and publication distribution; downloadable computer software applications to assist with product selection in the automotive, energy, fuel, grease, lubricant, and oil sectors; downloadable computer software for budgeting, forecasting, consolidation of financial data and financial reporting, for use in financial reporting or analysis; downloadable computer software for creating searchable databases of information and data; downloadable computer software for monitoring the operation of mechanized agricultural equipment during agricultural operations; downloadable computer software for the collection, editing, organizing, modifying, transmission, storage and sharing of data and information; downloadable computer software, namely, electronic financial software that accommodates multiple types of payment and debt transactions in an integrated mobile device and web based environment; downloadable computer software that provides business management intelligence by combining information from various databases and presenting it in an easy-to-understand user interface; downloadable mobile applications for accessing, planning, and managing information for use in the fields of agriculture, agronomy, automotive, energy, horticulture, and industrial equipment; downloadable mobile applications for recording field and crop observations related to pest pressure, tracking field conditions with GPS-enabled maps, and generating crop scouting reports; downloadable computer software for use by customers to

manage data relating to farm inputs, costs, and crop yield results; decision support systems in the nature of computer hardware and software for use in data collection, aggregation, analysis, georeferencing, management, reporting, warehousing, employment recruiting, financial analysis, event logistics, order entry, payments, product selection and use, and publication distribution in the field of precision agriculture and variable rate technology; decision support systems in the nature of computer hardware and software for use in data collection, aggregation, analysis, georeferencing, management, reporting, warehousing, employment recruiting, financial analysis, event logistics, order entry, payments, product selection and use, and publication distribution in the fields of agriculture, agronomy, automotive, energy, horticulture, and industrial equipment; simulators for driving and control of vehicles and farm equipment; software applications for use with mobile phones, tablet computers, mobile telecommunication devices, and personal computers, namely, software for assisting agricultural professionals with the inspection, research, data collection and analysis, spectral sampling, and information on crop health and precision agriculture methods and technology; software for accessing, planning, and managing information for use in the fields of agriculture, agronomy, automotive, energy, horticulture, and industrial equipment” in Class 9 and owns pending U.S. Application No. 88/241,514 and pending U.S.



Application No. 88/691,069 for  for “Agricultural mapping services; agricultural services, namely, providing temporary use of non-downloadable computer software applications for use with mobile phones, tablet computers, mobile telecommunication devices, and personal computers, namely, software for assisting agricultural professionals with the inspection, research, data collection and analysis, spectral sampling, and information on crop health and precision agriculture methods and technology; agricultural testing for seeds, crop protection products, and

fertilizer; analyzing and evaluating agricultural fertilizer and nutrients; analyzing and evaluating nitrogen in soil; application service provider (ASP) featuring e-commerce software for use as a payment gateway that authorizes processing of credit cards or direct payments for merchants; application service provider, namely, hosting, managing, developing, and maintaining applications, software, and web sites, in the fields of wireless communication, mobile information access, and remote data management for wireless delivery of content to handheld computers, laptops and mobile electronic devices; applied scientific research in the fields of agriculture, agronomy, farming and crop yields; cloud computing featuring software for use in farm information management; cloud computing featuring software for use in farm information management to provide statistics and graphical analysis of crop production, costs, and health; cloud computing featuring software used to provide financial analysis of a farm; cloud computing featuring software used to provide feedback from precision agriculture machinery, equipment, and devices; computer services, namely, acting as an application service provider in the field of information management to host computer application software for the purpose of ecommerce transaction processing, and information and data collection, editing, organizing, modifying, transmission, storage, and sharing; computer services, namely, providing a website featuring temporary use of non-downloadable computer software for collecting, analyzing, and providing data and information regarding electronic payment transactions; computer software design, computer programming, and maintenance of computer software; computer software development, computer programming, and maintenance of computer software for precision agriculture programs; providing temporary use of non-downloadable computer software for use in issuing and providing receipts for others for electronic payments and payment transactions; computer graphics design services, namely, creating of 3-D computer models; database design

and development; electronic data storage; farm product input services, namely, agricultural testing for determining soil nutrients and composition; field scouting services, namely, observing and inspecting agriculture fields to identify problems associated with weeds, insects, and diseases; mapping and surveying services for precision farming by means of the application and utilization of technologies and agronomic principles to manage spatial and temporal variability associated with all aspects of agricultural production using satellite imagery, GPS mapping, soil mapping, variable rate technologies, geospatial tools, and yield monitoring for improving the control and management of crops and increasing yields; providing temporary use of non-downloadable electronic financial software that accommodates multiple types of payment and debt transactions in an integrated mobile device and web based environment; providing temporary use of nondownloadable software for accessing, planning, and managing information for use in the fields of agriculture, agronomy, automotive, energy, horticulture, and industrial equipment; providing temporary use of non-downloadable software for budgeting, forecasting, and consolidation of financial data and financial reporting, and for use in financial reporting and analysis; providing temporary use of non-downloadable software for recording field and crop observations related to pest pressure, for tracking field conditions with GPS-enabled maps, and for generating crop scouting reports; providing temporary use of non-downloadable software that provides business management intelligence by combining information from various databases and presenting it in an easy-to-understand user interface; providing temporary use of non-downloadable software for agricultural, automotive, energy, and industrial uses, namely, for use in data collection, aggregation, analysis, georeferencing, management, reporting, warehousing, employment recruiting, financial analysis, event logistics, order entry, payments, product selection and use, and publication distribution; providing temporary use of non-downloadable

software applications to assist with product selection in the automotive, energy, fuel, grease, lubricant, and oil sectors; platform as a service (PAAS) featuring computer software platforms for agricultural fertilizer and nutrient monitoring and management in soil; platform as a service (PAAS) featuring computer software platforms for inventorying, tracking, and verifying plant available nitrogen in soil; platform as a service (PAAS) featuring computer software platforms for nitrogen monitoring and management in soil; professional consulting services about agricultural chemistry and fertility plans; providing a website featuring agricultural research information in the fields of agronomy, farming, and crop yields; providing a website featuring agricultural research information in the fields of biology, ecology, organisms, biosystematics, environment, biological control, entomology, mycology, and bacteriology; providing a website featuring technology that allows users to access, plan, and manage information in the fields of agriculture, agronomy, automotive, energy, horticulture, and industrial equipment; providing an interactive web site featuring technology that enables users to enter, access, track, manage, monitor, and generate information and reports regarding sales of products and services; providing an online non-downloadable internet based system in the nature of software applications featuring technology enabling users to access, plan, and manage information for use in the fields of agriculture, agronomy, automotive, energy, horticulture, and industrial equipment; providing information for farmers in the fields of agricultural and crop research; providing scientific information in the fields of agricultural research, agronomy, farming, crop yields, environmentalism, conservationism, biological diversity, global climate change, environmental sustainability, sustainable consumption, natural resource preservation, endangered species, sustainable business practices, environmental issues, soil sampling, crop observing, genetics, plant varieties, seeds, farming practices, harvesting, chemistry, crop production, crop

costs, and crop health; providing nondownloadable software applications featuring technology enabling users to access, plan, and manage information for use in the fields of agriculture, agronomy, automotive, energy, horticulture, and industrial equipment; providing technological and scientific information about agricultural fertilizer and nutrient monitoring and management; providing technological and scientific information about inventorying, tracking, and verifying plant-available nitrogen in soil; providing technological and scientific information about nitrogen monitoring and management in soil; providing temporary use of non-downloadable computer software for use in issuing and providing receipts for others for electronic payments and payment transactions; providing temporary use of non-downloadable computer software that enables consumers and businesses to perform electronic payment transactions through the use of their electronic signature, personal identification number (PIN), name, or photo; providing temporary use of on-line on-downloadable cloud computing software for accessing, selecting, processing, downloading, and managing map-based data for use in agriculture; providing temporary use of on-line non-downloadable computer software for payment processing, user authentication, and or management and tracking of payment transactions; providing temporary use of online non-downloadable software for use in collecting, analyzing, and providing data and information regarding electronic payment transactions; providing temporary use of on-line non-downloadable suite of software tools for agricultural field optimization and precision agriculture; reporting of soil testing results directly to growers; research and development in the field of agronomy, farming, and crop yields; scientific data analysis services and custom development of computer software in the field of precision agriculture, namely, the use of sensors, maps, imagery, soil conditions, crop yield and other data to monitor and devise a plan for increasing crop yield, together with the use of equipment to carry out the devised plan; scientific research services in

the fields of genetics, plant varieties, seeds, agronomy, and plant harvesting and transformation methods; providing temporary use of non-downloadable simulation software in the field of controlling agriculture and farm equipment and vehicles; technical research in the fields of soil and agronomy; providing temporary use of non-downloadable virtual reality training simulation software in the field of controlling agriculture and farm equipment and vehicles” in Class 42.

23. According to Growmark’s trademark registrations and applications (collectively the “Growmark FS Marks”), Growmark has used some of the Growmark FS Marks since 1955.

**Growmark’s Objections to Franklin Square’s Use and Registration of the FS INVESTMENTS® Marks**

24. On December 12, 2018, Growmark objected to the use of and registration for Franklin Square’s FS INVESTMENTS® Marks and demanded via cease and desist letter that Franklin Square: (1) change its business name to remove the letters FS; (2) cancel its trademark registrations for the FS INVESTMENTS® Marks; (3) cease all use of the FS INVESTMENTS® Marks; and (4) change its intended stock ticker to not include the letters FS. Growmark stated that if Franklin Square did not adhere to these demands, Growmark would “take all steps necessary to vigorously enforce its trademark rights.”

25. Franklin Square, through its counsel, responded to Growmark’s cease and desist demand on December 15, 2018, and expressly denied Growmark’s assertions that there was any likelihood of confusion between the FS INVESTMENTS® Marks and the Growmark FS Marks. Franklin Square additionally refused to comply with Growmark’s demands, advising that Franklin Square would vigorously defend its trademark rights.

26. The next time that Franklin Square heard from Growmark was **sixteen (16) months later**. On April 20, 2020, Growmark, through its counsel, filed Petitions for Cancellation against the Franklin Square FS INVESTMENTS® Marks. As grounds for

cancellation of the FS INVESTMENTS® Marks, Growmark alleged that there was a likelihood of confusion between the FS INVESTMENTS® Marks and certain Growmark FS Marks, namely, U.S. Reg. No. 5121266 for FS and Design, U.S. Reg. No. 5360625 for FS, U.S. Reg. No. 2371319 for FS AGRI-FINANCE, and other recently filed and pending Growmark applications, which are currently used and/or registered in connection with the Growmark Goods and Services.

27. In response to the Petitions for Cancellation, Franklin Square offered to consent to Growmark's recent U.S. Trademark Application and enter into a coexistence agreement, but Growmark declined and, once again, demanded that Franklin Square must cease all use of the FS INVESTMENTS® Marks, including changing its business name to remove the letters FS and agreeing to cancel its trademark registrations for all of the FS INVESTMENTS® Marks.

**Coexistence of Franklin Square and Growmark**

28. The FS INVESTMENTS® Marks have coexisted with the Growmark FS Marks for over eleven (11) years.

29. There have been no instances of actual confusion between the goods and services offered under the FS INVESTMENTS® Marks and the Growmark FS Marks, and Growmark has provided no evidence of actual confusion.

30. Growmark has no reasonable basis for seeking to cancel the FS INVESTMENTS® Marks as it has not successfully opposed numerous federal registrations or prevented third party use of other "FS" marks in connection with similar banking and/or financial services, including but not limited to:

- U.S. Trademark Reg. No. 5870759 for FS|B and Design for banking and financing services; credit and loan services; insurance brokerage; investment advisory services; credit card and payment card services owned by First State Bank of Middlebury;



- U.S. Trademark Reg. No. 5365395 for F S and Design for providing on-line information regarding personal finances, financial risk assessment, and budgeting, owned by MX Technologies, Inc.;
- U.S. Trademark Reg. No. 4980966 for FS (stylized) for flood insurance, namely, providing real estate flood insurance; financial risk assessment, namely, providing flood risk analysis information and making flood hazard determinations of residential and commercial properties for insurance purposes owned by Flood Search LLC;
- Third-party use of FS for a life and wealth advisory team for celebrity wealth and high net worth clients and corporate clients, see <https://fswealthse.com/our-firm/>;
- Third-party use of FS ADVISORS for the creation of comprehensive financial projects and other financial services, see <http://www.fsadvisorsinc.com/consulting-services>;
- Third-party use of FS-ISAC for cyber and physical threat intelligence analysis and sharing in the financial industry, see <https://www.fsisac.com/about>;
- Third-party use of FS INSIGHT for a blog concerning finance, investing, and business, see <https://fsinsight.org/contact/>;
- Third-party use of FS FINANCIAL STRATEGIES, LLC for investment services, see <http://www.fsfinancialstrategies.com/>;
- Third-party use of FS INVESTMENTS for investment advice and associated services, see <https://www.firststatebanks.com/investments.php>;
- Third-party use of FS VECTOR for advisory services concerning technological advances in finance, see <https://www.fsvector.com/>;
- Third-party use of UMA|FS for financial planning services for physicians, see <https://www.umafs.org/>; and
- Third-party use of BEACON FS LTD for financial consulting and investment management services, see <http://www.beaconfs.com/>.

31. The Growmark FS Marks are weak and diluted given the descriptive nature and the many third party uses and registrations of other marks that contain FS for banking and/or financially related services.

32. FS as used in the Growmark FS Marks is inherently weak, as it would be readily understood by consumers as referring to “financial services” when viewed in connection with banking services (see <https://www.acronymfinder.com/Business/FS.html> showing that “FS” is a common abbreviation for “financial services”).

33. The Growmark FS Marks are further diluted and weakened by the fact that Growmark filed Opposition Proceeding 91240594 against the First State Bank of Middlebury’s FS|B mark listed above, but later withdrew the opposition and voluntarily allowed another mark containing FS to coexist for multiple years in Class 36 for banking services once the First State Bank of Middlebury raised certain counterclaims concerning the validity of certain of the Growmark FS Marks. This is further evidence that Growmark is able to use its Growmark FS Marks for banking services alongside other third party uses of marks that contain FS without a likelihood of confusion.

34. The FS INVESTMENTS® Mark and the FS Marks are distinct in sound, appearance and commercial impression as applied to their respective goods and services.

35. Although the respective marks both contain the letters “FS”, they are distinct to an ordinary observer.

36. Franklin Square is currently using the FS INVESTMENTS® Marks in connection with various asset and related management services that are different and unlikely to cause any consumer/client confusion to those banking and financial services specifically focused on agriculture offered by Growmark under its Growmark FS Marks.

37. To the extent Growmark offers banking services in International Class 36, Franklin Square’s Asset Management Services are sufficiently and significantly unrelated from Growmark’s services so as to alleviate any likelihood of confusion, as Franklin Square focuses


primarily on providing asset management services for a suite of investment funds and other investment product offerings designed primarily for individuals and institutions, see <https://www.fsinvestments.com/about>, whereas Growmark focuses on providing loans and related financing services to farmers, see <https://www.graincofs.com/Products-%20Services/Agriculture/Agri-Finance>.

38. Growmark is an agricultural supply cooperative and the only financial services it provides are the provision of loans and related financing services to farmers and it does not provide asset management of its own funds and/or other investment product offerings, so it is highly unlikely that a consumer procuring an agricultural-related loan would associate the same with an asset manager of funds or other investment product offerings.

39. Franklin Square's FS INVESTMENTS® Marks and Growmark's Growmark FS Marks are sufficiently and significantly dissimilar in sight, sound, meaning, and commercial impression so as to minimize any potential consumer confusion, particularly given the inherently weak and diluted nature of FS as used in the Growmark FS Marks.

40. Franklin Square's FS INVESTMENTS® Marks all have the addition of various terms and/or design elements in connection with the letters FS, such as INVESTMENTS,

INVESTMENT SOLUTIONS, and , whereas, Growmark uses FS alone or with

design elements  or additional words (FS AGRI-FINANCE) that are more than sufficient to differentiate the Franklin Square FS INVESTMENTS® Marks from the Growmark FS Marks.

41. The Growmark Mark and the FS Mark have entirely different overall commercial impressions as the FS in the Growmark Mark, when used in connection with “banking services”, would be readily understood by consumers as referring descriptively to “financial services” compared to the FS in the FS INVESTMENTS® Marks that clearly stands for Franklin Square used in the Franklin Templeton corporate name.

42. Franklin Square’s client base is primarily comprised of independent broker dealers, registered investment advisors and other institutional advisors; whereas, Growmark’s client base is primarily comprised of farmers.

43. Consumers/clients of the goods/services offered in connection with the FS INVESTMENTS® Marks and the Growmark FS Marks would be considered highly sophisticated.

44. Franklin Square’s and Growmark’s respective customers/clients would take great care before investing in a fund or other investment product offerings managed by Franklin Square or engaging Growmark to obtain a loan. Consumers are very cautious when making investments or obtaining loans, and there are multiple procedural and logistical steps that must be completed before obtaining the same. Specifically, to buy Franklin Square’s funds or other investment product offerings, consumers generally must go through licensed brokers or other investment professionals who are sophisticated, deal with thousands of different investment options, and are required to not only understand these options but ensure the consumers considering these investments do too, including through the delivery of a prospectus and/or other sales materials approved by various regulatory authorities, and, as a result, consumers would simply not be confused into believing that one party or its respective services was or were

associated or affiliated with, or sponsored or endorsed by, the other party or such other party's goods/services.

45. The asset management services provided by Franklin Square are offered in different trade channels than Growmark's agricultural-related goods/services.

46. In sum, Franklin Square and Growmark are not competitors, operate in different industries, direct their respective Growmark FS Marks and FS INVESTMENTS® Marks towards very different consumers/clients, and operate in completely different channels of trade.

**COUNT I: DECLARATORY JUDGMENT OF NON-INFRINGEMENT**

47. Franklin Square repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

48. This claim seeks a declaratory judgment of non-infringement of Franklin Square's FS INVESTMENTS® Marks with the Growmark FS Marks.

49. These claims arise under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

50. There is an actual case or controversy such that the Court may entertain Franklin Square's request for declaratory relief consistent with Article III of the United States Constitution, and that actual case or controversy requires a declaration of rights by this Court.

51. Franklin Square's use of or registration for the FS INVESTMENTS® Marks does not violate Growmark's trademark rights, and no likelihood of confusion exists with respect to Franklin Square's adoption, selection, registration, and/or use of the FS INVESTMENTS® Marks and Growmark's use of and registration for the Growmark FS Marks.

52. Growmark's allegations of trademark infringement have caused, and will continue to cause damage to Franklin Square.

53. Growmark will continue its allegations of trademark infringement unless enjoined by this Court.

54. Accordingly, Franklin Square respectfully requests, pursuant to 28 U.S.C. § 2201, that the Court declare the rights and relations among the parties with respect to the subject matter hereof, to include a declaration that (i) Franklin Square has the right to use the FS INVESTMENTS® Marks in commerce in connection with the Franklin Square Asset Management Services; (ii) Franklin Square has the right to own all right, title and interest, in and to the USPTO registrations for the FS INVESTMENTS® Marks; and (iii) no likelihood of confusion exists between the FS INVESTMENTS® Marks and the Growmark FS Marks.

55. In light of the foregoing, an actual, judicable case or controversy exists between the parties. Thus, a judicial declaration is necessary and appropriate at this time in order for the parties to ascertain their respective rights and duties with respect to Franklin Square's use of its FS INVESTMENTS® Marks.

**COUNT II: DECLARATORY JUDGMENT OF NO UNFAIR COMPETITION BY  
FRANKLIN SQUARE**

56. Franklin Square repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

57. This claim seeks a declaratory judgment of no unfair competition by Franklin Square's via its use of its FS INVESTMENTS® Marks in commerce in connection with the Growmark FS Marks.

58. These claims arise under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

59. There is an actual case or controversy such that the Court may entertain Franklin Square's request for declaratory relief consistent with Article III of the United States Constitution, and that actual case or controversy requires a declaration of rights by this Court.

60. Franklin Square does not engage in any act of unfair competition by using the FS INVESTMENTS® Marks mark in commerce in connection with the Franklin Square Asset Management Services.

61. Growmark's allegation of unfair competition has caused, and will continue to cause, damage to Franklin Square.

62. Growmark will continue its allegations of unfair competition unless enjoined by this Court.

63. Accordingly, Franklin Square respectfully requests, pursuant to 28 U.S.C. § 2201, that this Court declares the rights and relations among the parties with respect to the subject matter hereof, to include a declaration that Franklin Square does not engage in any act of unfair competition by using the FS INVESTMENTS® Mark in commerce in connection with the Franklin Square Asset Management Services.

**COUNT III: DECLARATORY JUDGMENT CONFIRMING CONTINUED  
REGISTRATION OF FS INVESTMENTS® MARKS PURSUANT TO 15 U.S.C. 1119**

64. Franklin Square repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

65. This claim seeks a declaratory judgment of continued registration of Franklin Square's FS INVESTMENTS® Marks with the United States Patent and Trademark Office.

66. These claims arise under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

67. There is an actual case or controversy such that the Court may entertain Franklin Square's request for declaratory relief consistent with Article III of the United States Constitution, and that actual case or controversy requires a declaration of rights by this Court.

68. Franklin Square owns U.S. Trademark Registration No. 4,723,056 for FS INVESTMENTS for "[i]nvestment of funds for others; management of investment of funds for others; investment management services; Business Development Company funding services to small and mid-sized businesses; Business Development Company services, namely, providing financing to small and mid-sized businesses; Business Development Company fund management; Business Development Company financing; mutual fund brokerage, distribution, investment; investment administration, distribution, and management of mutual funds; financial portfolio and investment management; investment advisory services; investment consultation; financial asset management; stock brokerage services; fund investment consultation; funds investment; asset allocation services" in International Class 36 and first used this mark in commerce on May 30, 2009.

69. Franklin Square owns U.S. Trademark Registration No. 4,989,475 for FS



INVESTMENTS and Design for "[i]nvestment of funds for others; management of investment of funds for others; investment management services; Business Development Company funding services to small and mid-sized businesses; Business Development Company services, namely, providing financing to small and mid-sized businesses; Business Development Company fund management; Business Development Company financing; mutual fund brokerage, distribution, investment; investment administration, distribution, and management of mutual funds; financial portfolio and investment management; investment advisory services;



investment consultation; financial asset management; stock brokerage services; fund investment consultation; funds investment; asset allocation services” in International Class 36 and first used this mark in commerce on January 26, 2016.

70. Franklin Square owns U.S. Trademark Registration No. 5,102,059 for FS INVESTMENT SOLUTIONS for “[i]nvestment of funds for others; management of investment of funds for others; investment management services; Business Development Company funding services to small and mid-sized businesses; Business Development Company services, namely, providing financing to small and mid-sized businesses; Business Development Company fund management; Business Development Company financing; mutual fund brokerage, distribution, investment; investment administration, distribution, and management of mutual funds; financial portfolio and investment management; investment advisory services; investment consultation; financial asset management; stock brokerage services; fund investment consultation; funds investment; asset allocation services; financial services, namely, broker/dealer services on securities exchanges and over-the-counter markets” in International Class 36 and first used this mark in commerce on August 16, 2016.

71. Franklin Square FS INVESTMENTS® Marks are federally registered and, as such, are prima facie evidence of the exclusive right of Franklin Square to use the Franklin Square FS INVESTMENTS® Marks in connection with the Franklin Square Asset Management Services appearing in these registrations. 15 U.S.C. § 1115.

72. On April 20, 2020, Growmark, through its counsel, filed Petitions for Cancellation against the Franklin Square FS INVESTMENTS® Marks. As grounds for cancellation of the FS INVESTMENTS® Marks, Growmark alleged that there was a likelihood of confusion between the FS INVESTMENTS® Marks and certain Growmark FS Marks,

namely, U.S. Reg. No, 5121266 for FS and Design, U.S. Reg. No, 5360625 for FS, U.S. Reg. No.2371319 for FS AGRI-FINANCE, and other recently filed and pending Growmark applications, which are currently used and/or registered in connection with the Growmark Goods and Services.

73. Section 37 of the Lanham Act, grants the power for this Court, to determine the right to registration, order the cancelation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. 15 U.S.C. § 1119.

74. The Petitions for Cancellation have been suspended by the Trademark Trial and Appeal Board of the USPTO pending the outcome of this federal action.

75. Accordingly, Franklin Square respectfully requests, pursuant to 28 U.S.C. § 2201, that the Court declare that the federal registrations for the FS INVESTMENTS® Marks remain registered and deny the cancellation actions filed by Growmark against the FS INVESTMENTS® Marks as no likelihood of confusion exists between the FS INVESTMENTS® Marks and the Growmark FS Marks.

76. In light of the foregoing, an actual, judicable case or controversy exists between the parties. Thus, a judicial declaration is necessary and appropriate at this time in order for the parties to ascertain their respective rights and duties with respect to Franklin Square's registrations of its FS INVESTMENTS® Marks.

#### **PRAYERS FOR RELIEF**

**WHEREFORE**, Franklin Square prays for relief against Growmark as follows:

(1) That the Court declare that Franklin Square's use of and registration for its FS INVESTMENTS® Marks does not infringe any trademark, service mark, or trade name of Growmark, including but not limited to, the Growmark FS Marks.

(2) That the Court declare that Franklin Square does not engage in any act of unfair competition by using the FS INVESTMENTS® Marks in commerce in connection with the Franklin Square Asset Management Services.

(3) That the Court declare that Franklin Square's registrations of its FS INVESTMENTS® Marks remain registered as the FS INVESTMENTS® Marks do not infringe any registered trademark, service mark, or trade name of Growmark, including but not limited to, the Growmark FS Marks.

(4) That the Court award Franklin Square its reasonable attorney's fees and the costs of this action.

(5) That the Court grant Franklin Square such other relief as is just and proper.

Dated: October 8, 2020

Respectfully submitted by:

COZEN O'CONNOR

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